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IN THE

Supreme Court of the United States

October Term, 1956.

No. [redacted] 63

BOARD OF PUBLIC EDUCATION, SCHOOL DISTRICT OF PHILADELPHIA,

Respondent,

v.

HERMAN BEILAN,

Petitioner.

On Petition for Certiorari to the Supreme Court of Pennsylvania.

Brief for Respondent in Opposition.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1956.

No. 668.

BOARD OF PUBLIC EDUCATION, SCHOOL DISTRICT OF PHILADELPHIA,

Respondent,

v.

HERMAN BEILAN,

Petitioner.

ON PETITION FOR CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinions in the Supreme Court of Pennsylvania are appended to the Petition for Writ of Certiorari.

JURISDICTION.

Petitioner has invoked the jurisdiction of this Court under Title 28 U. S. C., Section 1257(3). Respondent submits that no question under the Constitution or laws of the United States is raised by the dismissal of a public school teacher on the statutory ground of "incompetency" under the teachers tenure laws of Pennsylvania, after proper notice of charges are filed therein, where the charge of incompetency was based upon the teacher's refusal to answer proper questions of his Superintendent in a professional interview. The decision of the Pennsylvania Supreme Court was based on adequate non-federal grounds. There is no federal question for this Court.

QUESTION PRESENTED.

Whether this Court should review a state Supreme Court's decision that a school teacher's refusal to answer questions asked by his Superintendent as to his alleged past membership in subversive organizations, constituted incompetency within the meaning of a state statute and therefore justified his dismissal after notice and hearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Constitutional and statutory provisions are set out in the Petition for Writ of Certiorari.

STATEMENT OF THE CASE.

This is a proceeding under the tenure provisions of the Public School Code of the Commonwealth of Pennsylvania, Act of March 10, 1949, P. L. 30, § 1122 et seq., as amended, 24 Purdon's Pa. Stat. Ann. §§ 11-1122 et seq., dismissing a public school teacher.

The Board of Public Education of the School District of Philadelphia dismissed the petitioner, after a hearing held on due notice of charges, on the ground of incompetency. The Superintendent of Public Instruction of the Commonwealth affirmed the decision of the Board. The petitioner appealed to the Court of Common Pleas of Philadelphia County, which reversed the order and set aside the discharge of the teacher. On appeal by the Board to the Supreme Court of Pennsylvania, the order of the lower court was reversed and the order of the State Superintendent of Public Instruction dismissing the petitioner was reinstated.

This teacher was not charged with disloyalty. He was not dismissed because of disloyalty. He was dismissed because, in an interview with his Superintendent, he refused to answer questions which directly concerned his professional fitness.

The Board of Public Education also sustained an additional reason for dismissal. This concerned the petitioner's refusal to answer questions concerning his alleged Communist affiliations during the period 1943 to 1948, in his appearance before a Congressional Committee. This second ground for dismissal is not before this Court on this Petition for Certiorari, as the Supreme Court of Pennsylvania sustained the dismissal on the basis of the petitioner's refusal to answer the questions of the Superintendent of Schools in the professional interview, and found it unnecessary to consider whether the other charge was also sustained (Opinion, Petitioner's Appendix A, p. 11a).

At the written request of the Superintendent of Schools, petitioner reported to the Superintendent's office for an interview on June 25, 1952. At this conference the Superintendent stated that he had received information which, if true, reflected adversely on petitioner and that he wished to discuss this information to determine whether it was true (R. 19a). Petitioner suggested that the Superintendent ask the questions. The Superintendent said that he wanted the answer to each question before asking the next one. He then asked whether petitioner was Press Director of the Professional Section of the Communist Political Association in 1944. Petitioner requested that he be permitted to consult counsel and the Superintendent agreed to this request.

A second conference took place in the Superintendent's office on October 14, 1952, at the Superintendent's written request. Petitioner stated that he had consulted counsel and that he would not answer either the question about his Communist activities in 1944 or any questions of a similar character (R. 22a).

The Superintendent explained that this was a very serious and important matter and that failure to answer might lead to dismissal (R. 22a). Petitioner persisted in his refusal to answer questions.

The Board of Public Education conducted a formal hearing on the charges of incompetency, as required by § 1127 of the Pennsylvania Public School Code of 1949, P. L. 30 (24 Purdon's Pa. Stat. Ann. §§ 11-1127).

Petitioner was present and represented by counsel, who participated actively in the hearing. He was afforded opportunity to offer evidence, but did not do so. Petitioner did not testify on his own behalf at the hearing before the Board.

The Board of Public Education found that the charges of incompetency were sustained and petitioner was dismissed by a 14 to 1 vote of the Board (R. 75a). On petitioner's appeal to the Superintendent of Public Instruction of the Commonwealth, the State Superintendent sustained the action of the Philadelphia Board of Public Education (R. 76a-80a).

The petitioner then appealed to the Court of Common Pleas, where his appeal was heard on the record before the Board, and no further testimony was offered by the petitioner, although under the School Code he had the right to present additional evidence if he so desired. That court reversed the order of the Superintendent of Public Instruction and set aside the dismissal (R. 104a-112a).

On appeal of the Board to the Supreme Court of Pennsylvania, the order of the lower court was reversed and the order of dismissal was sustained. The Supreme Court denied the petition for reargument (Opinion and Order, Petition for Certiorari, Appendix A, 1a-32a).

ARGUMENT.

I. The Decision of the Supreme Court of Pennsylvania Is Based on an Interpretation of the State Law.

The Supreme Court of Pennsylvania based its decision on the findings of fact of the Board and the application of state law to those facts. It is not the function of this Court to review such issues.

The Court held that the Board of Public Education acted properly in dismissing the petitioner for "incompetency" under § 1122 of the Public School Code. In arriving at its interpretation the Court relied on its own previous opinions that incompetency as a cause for dismissal was to be given a broad meaning, that the term was not technical, that in common and approved usage it meant "disqualification; inability; incapacity; lack of ability, legal qualification, or fitness to discharge the required duty", or "want of physical, intellectual, or moral ability; insufficiency; inadequacy; specif., want of legal qualifications or fitness", or "general lack of capacity of fitness or lack of the special qualifications required for a particular purpose". *Horosko v. Mt. Pleasant Township School District, et al.*, 335 Pa. 369, 6 A. 2d 866.

The Court concluded in the present case that "Certainly a teacher who refuses to respond to a pertinent inquiry relative to his fitness to teach is not competent within the broad reach of that term, whether the inquiry concerns loyalty or any other proper subject of inquiry. Frankness and cooperation with an administrative superior bear directly upon a teacher's competency. They are as essential in one occupying a post of public trust and civic responsibility as academic qualifications". (Petition for Certiorari, Appendix A, p. 7a.)

The Supreme Court of Pennsylvania was determining only the proper interpretation of "incompetency" as a ground for dismissal in a state statute.

The Court also held that the discharge of this petitioner for "incompetency" was proper under the Public School Code, and that it was not necessary that the proceeding for dismissal be brought under the Pennsylvania Loyalty Act of December 22, 1951, P. L. 1726, 65 Purdon's Pa. Stat. Ann. §§ 211-225. The Court of Common Pleas had reversed the order of dismissal, not on any constitutional ground, but on the ground that the Loyalty Act of the State had so dealt with the matter of loyalty that the proceedings to dismiss this teacher on the ground of incompetency under the Public School Code were precluded.

The Supreme Court, in reversing the decision of the Court of Common Pleas, held that the record clearly showed that the ground for dismissal was not disloyalty, that the proceedings before the Board of Education were not concerned with the question of any suspected disloyalty, and that the proceedings under the general tenure provisions were clearly proper.

In so holding, the Pennsylvania Supreme Court was simply interpreting the laws of the State of Pennsylvania in holding that the Loyalty Act did not preclude dismissal of a teacher on the ground of incompetency for refusal to answer a pertinent question concerning his past affiliations. The Supreme Court properly distinguished between a proceeding for dismissal on charges of disloyalty, or subversion, and a proceeding under the Tenure Act for dismissal for incompetency because of the teacher's refusal to perform his professional obligation of responding to relevant questions of his Superintendent concerning past associations which bore upon his fitness to teach.

The Supreme Court of Pennsylvania was concerned with the reconciliation of two Acts of the State Legislature. No federal constitutional question is involved in that determination, and it is not a proper matter for review by this Court.

The question of loyalty was injected into the case by petitioner himself, and only because the questions he re-

fused to answer concerned his former subversive associations. Furthermore, this Court has already held that former subversive associations of a teacher are a matter of pertinent inquiry by his public employer.[1] That question is therefore settled.

If an inquiry into past conduct is relevant to present fitness, it does not matter whether the conduct in question related to lawful or unlawful activity.

The Board of Public Education did not base its finding of incompetency on any assumption or inference that the petitioner was disloyal, because he had refused to answer the questions relating to alleged former subversive activities. On the contrary, as the Supreme Court of Pennsylvania held, the finding of incompetency was based on the teacher's refusal to cooperate frankly with his Superintendent in an inquiry which the Superintendent had the power and duty to make.

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1. "A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined in part by the company he keeps. In the employment of officials and teachers of the school system, the state may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the state, when determining the fitness and loyalty of such persons, from considering the organizations and persons with whom they associate." *Adler et al. v. Board of Education of the City of New York*, 342 U. S. 485, 493 (1952).

"We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment." *Garner et al. v. Board of Public Works of Los Angeles, et al.*, 341 U. S. 716, 720 (1951).

The contention that petitioner was dismissed because the Board suspected that he was disloyal was considered and rejected by the Supreme Court of Pennsylvania, which held there was no basis in the record for imputing to the Board any such conclusion.

In holding that the Superintendent had the right and duty to make such a relevant inquiry, and that the teacher had the corresponding duty to respond to it, the Supreme Court of Pennsylvania has acted upon and decided only a question of state law.

II. The Decision of the Supreme Court of Pennsylvania Is Not in Conflict With the Decisions of This Court.

In its argument in support of the Petition, the petitioner argues, rather inconsistently, both that the issue is one which this Court has not decided and that the Pennsylvania decision is not in accord with those of this Court.

Petitioner's reliance on the decisions in *Slochower v. Board of Higher Education of New York City*, 350 U. S. 551, and *Wieman v. Updegraff*, 344 U. S. 183, is misplaced. Indeed those decision demonstrate the lack of merit in petitioner's case.

In the *Slochower* case, this Court reversed the dismissal of a professor employed in a public college in New York City, on the ground that he was dismissed summarily under an ordinance which gave him *no right to a hearing* preliminary to his discharge. In the *present* case, the petitioner was accorded a full hearing on the charge of "incompetency", as provided by the Public School Code.

The Supreme Court of Pennsylvania in the present case has adequately distinguished the *Slochower* decision on the basis of the statement in the opinion of this Court at 350 U. S. 558:

> "'it is one thing for the city authorities themselves to inquire into Slochower's fitness, but quite another for his discharge to be based entirely on events occurring before a federal committee whose inquiry was announced as not directed at "the property, affairs

or government of the city, or * * * official conduct of city employees". In this respect the present case differs materially from Garner, where the city was attempting to elicit information necessary to determine the qualifications of its employes * * *'" 386 Pa. 92, at pp. 93, 94 (Petitioner's Appendix, 10a-11a).

This Court also stated in the *Slochower* case that no inference of guilt could be properly drawn from a person's exercise of his constitutional right to refuse to testify under the Fifth Amendment. The Fifth Amendment was not involved in petitioner's professional interview with his Superintendent of Schools, and it is not raised in the Petition for Certiorari. Furthermore, no infefence of guilt was drawn from the failure to answer questions, since petitioner was not dismissed on the ground of disloyalty or suspicion of disloyalty.

In *Wieman v. Updegraf, supra*, this Court held that a state law requiring a loyalty oath was invalid because it required the employee to state that he was not affiliated, directly or indirectly, with any organization which had been determined to be subversive. The defect of the Oklahoma law was that the employee was required to swear to this statement, regardless of whether he knew of the subversive nature of the organization. This Court held that such membership might have been innocent, and, in such case, mere innocent membership could have resulted in dismissal.

In the *Wieman* case this Court was not concerned at all with the requirement of disclosure which had been before it as to the affidavit requirement in the *Garner* case. The Court did *not* hold in the *Wieman* case that an employee could *not* be required to disclose even an innocent membership. It held only that an employee *could not be dismissed* because of membership in some organization which he might have joined innocently without knowledge of its subversive purposes.

The *Wieman* case was a loyalty case. The Pennsylvania Supreme Court has held that the present case is not

a loyalty proceeding, that it does not involve charges of subversion, and that it does not involve the question of whether innocent membership in a Communist organization would be cause for dismissal.

The *Wieman* case does not disable a public employer from requiring its employees to disclose their past associations on a proper inquiry into their fitness to hold responsible public positions.

The accusation which is made again in the Petition for Certiorari, as it was before the Supreme Court of Pennsylvania, that the charge of incompetency was a sham, and that petitioner was really dismissed because he was suspected of disloyalty, has already been answered. It was considered directly and answered specifically by the Supreme Court of Pennsylvania. The Court analyzed carefully the procedure employed by the Board of Public Education. It rejected the implication of any lack of good faith on the part of the Board of Education. The language of the Supreme Court of Pennsylvania leaves no doubt that it rejected this charge that the School Board employed a "sham" in order to rid itself of an undesirable teacher. The reckless language appearing on page 14 of the Petition for Certiorari is answered with dignity by the Supreme Court of Pennsylvania, which says in its majority opinion (p. 4a):

> "* * * we find absolutely no support for the second conclusion reached by the court below.[2] It not only impugns the good faith of the members of the Board but completely brushes aside the record which consistently from beginning to end irrefutably demonstrates that appellee was not dismissed for subversion or disloyalty but for refusal to answer pertinent questions bearing directly upon his fitness as a teacher and, therefore, his competency."

"2. In its opinion the court states: 'The school authorities obviously desired to dismiss appellant because they suspected him of disloyalty.' and 'The Tenure Act was utilized as an expedient short-cut.'"

This constant, studied and reiterated attempt, despite the uniquivocal record to the contrary, to create an impression that this public school teacher was dismissed because of disloyalty instead of incompetency, has been held by the Supreme Court of Pennsylvania to be completely unfounded.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this Petition for Certiorari should be denied.

Respectfully submitted,

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